

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 273 of 1996****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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THAKORE RAJJUJI AMTHAJI & 3 - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR EE SAIYED for Appellant(s) : 1 - 4.

MR PD BHATTE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 27/11/2007****ORAL JUDGMENT**

1. In the present appeal, the appellants original
accused have challenged a judgement and order
dated 29.3.1996, rendered by learned Additional

Sessions Judge, Mehsana, in Sessions Case No.121/1995. The appellants were convicted under Section 304 Part-II of Indian Penal Code read with Section 114 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of four years and also pay a fine of Rs. 2000/-. They were also convicted under Sections 323, 506(2) read with Section 114 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of 15 days. Sentences were to run concurrently.

2. Emerging from Charge(exh.20) framed by learned Sessions Judge, prosecution case was that on 19.3.1995, at about 5 0' Clock in the evening when the complainant was at his residence, the accused Nos.1 and 2 carrying "Dhariya" and accused Nos. 3 and 4 carrying Sticks went there and asked the nephew of complainant Balvantsingh to compromise a case lodged by him. When Balvantji declined, accused No.2 gave a "Dhariya" blow to Balvantji on the left side of his neck. Accused Nos. 3 and 4 gave Stick blows to Balvantji who on account of injuries, while under treatment, expired. As Dalsangji intervened, accused No.1 gave a "Dhariya" blow to him on his right elbow. The accused were therefore, charged with commission of offences punishable under Section 302 read with Section 34 of the Indian Penal Code.

3. Complainant Thakore Amratji Madhaji-PW3 was examined at exh.37. He stated that on the date of incident, at about 5 0' Clock, he was sitting at his house. At that time, accused Nos. 1 and 2 came with "Dhariya" and accused Nos. 3 and 4 came with Sticks. His nephew Balvantji was sitting in front of the house. Accused No.2 told him that his brother has filed a complaint which should be compromised. Balvantji however, declined. Accused No.2 Bhikhaji therefore, gave a "Dhariya" blow to him on the left side of his neck. Accused Nos. 3 and 4 i.e. Ishwarji Galabji and Jesangji Hiraji hit Balvantji on the stomach with their Sticks. As Dalsangji intervened, accused No.1 gave a "Dhariya" blow to him on his right elbow. At that time Mangaji and Parbatji arrived. They intervened. The accused while leaving were saying that the case must be compromised or else they will kill them. Since they could not find any vehicle, injured person was bodily carried to Dharoi colony from where they brought him to Kheralu Government Hospital. The complainant thereafter, went to Satlasana police station for lodging the complaint. Champuji had earlier filed complaint against brother of the accused. Champuji happens to be younger brother of Balvantji. The complaint was filed four months before the incident. Since the accused also belonged to the same village, the complainant knew them before hand.

3.1 In his cross examination, the witness denied the suggestion that Balvantji received injuries during some other quarrel. He stated that injured was brought to Kheralu hospital at about 10 0' clock at night. Two to three hours thereafter, he was shifted to Mehsana Government hospital where he remained for two days and was thereafter, brought to Ahmedabad Civil Hospital. He admitted that till he was brought to Mehsana, Balvantji was conscious. He denied that there was an incident of stone throwing between the two groups during which Balvantji received injuries. He stated that in the village there are about 80 households of Thakore community, out of which eight are his relatives. Rest belonged to the rival group.

4. Dalsangji Keshaji Thakore-PW4 was examined at exh.39. He stated that on the date of incident at about 5 0' Clock when he was at his house since there was commotion near the house of Balvantji, he rushed there. He saw that accused Nos. 1 and 2 were there with "Dhariya" and accused Nos. 3 and 4 were carrying Sticks. They were telling Balvantji to compromise the complaint filed by Champuji. Balvantji declined. Bhikhaji accused No.2 gave a "Dhariya" blow on the left side of the neck of Balvantji. He therefore, fell down. Accused Nos. 3 and 4 therefore, gave Stick blows to Balvantji. Dalsangji intervened. Accused No.1 gave a

“Dhariya” blow to him on his right elbow. Mangaji and Parbatji also arrived at that time. They separated everyone. Accused however, while leaving said that you may have been saved today, but we will kill you. The witness and Balvantji were thereafter taken to Satlasana hospital. However, since there was no Doctor there, they were taken to Kheralu Government hospital. After some treatment, the Doctor advised him to go to Mehsana Government Hospital. They were admitted as indoor patients there. The witness was discharged from the hospital next day. Balvantji however, was taken to Ahmedabad Civil Hospital for further treatment where during treatment he expired.

4.1 In his cross examination, the witness stated that at the time of incident except for the four accused, there were no other outsiders. After Balvantji got injured, a crowd of about 8 to 10 persons gathered there. At that time stones were being thrown but Balvantji was not hit by any stone. He stated that Balvantji had fallen down. There were no “Khila”(iron or wooden peg for tying cattle). He had no knowledge about the earlier quarrel between the two groups. He stated that Champuji had filed a complaint before three to four months of the incident and the case had not yet come on Board for hearing.

5. Thakore Parbatji Kadvaji-PW5 was examined at exh.40. He also narrated the incident in somewhat similar fashion of accused No.2 giving "Dhariya" blow to the deceased and accused Nos.3 and 4 giving Stick blows to him as well as accused No.1 having given "Dhariya" blow to Dalsangji.

5.1 In cross examination, the witness stated that when he reached the spot, some 8 to 10 people had gathered there. He denied that he reached there after the incident was over.

6. Thakore Jashvantji Shankarji-PW6 who was examined at exh.41 was a Panch Witness who was present at the panchnama of scene of incident.

7. Thakore Vadesinh Cheharaji-PW7 who was examined at exh. 43 was a Panch witness in whose presence the Muddamal weapons were stated to have been recovered at the instance of the accused. He however, turned hostile and did not support prosecution.

8. Somabhai Vithalbhai Bajaniya-PW9 who was examined at exh.52 was other Panch witness who was party to the recovery Panchnama. He narrated the manner in which the weapons were recovered by the police at the instance of the accused.

9. Karimkhan Adamkhan-PW12 who was examined at

exh.59 was the PS0 who had taken down the complaint.

10.Nareshkumar Meghaji-PW13 who was examined at exh.61 was the Head Constable who had recorded the statement of deceased Balvantji. He produced the statement of Balvantji at exh.42.

11.Laxmanbhai Khimjibhai Chauhan-PW14 was examined at exh.63. He was the PSI who had carried out the investigation. Besides the nature of investigation, he also described how weapons were recovered by the police.

12.Dr. Tushar Mohanlal Shetlavad-PW2 who was examined at exh.32 was the Medical Officer in charge of Kheralu Primary Health Centre. He stated that Balvantji was brought to him at about 10:30 in the night of 19.3.1995 along with Police Yadi. The patient had given history of being attacked with "Dhariya" and Sticks. Doctor had found one injury of 10cm x 6 cm long on the left side of the neck. As per the version of the patient, he had vomited and colour of vomit was green. He was having pain in stomach and was having difficulty in standing and sitting down. Stomach walls were tight. There were no external injuries. Doctor therefore, was of the opinion that patient must be having some internal stomach injury. He therefore, took his chest and stomach X-ray. Upon examining the X-ray, since

he was unable to give any exact diagnosis, he advised the patient to be shifted to Mehsana Civil Hospital. He was of the opinion that injuries on the stomach could have been caused by blunt hard substance. He had also examined Dalsangji who had given history of being attacked with "Dhariya". He had one lacerated wound of 1cm x 0.5cm on the right elbow. It was skin deep. Since he was unable to state whether the patient had suffered fracture, he was also referred to Mehsana Civil Hospital.

12.1 In his cross examination, he denied that injuries were simple in nature. Though he stated that the injuries to Balvantji on the stomach could be caused by a stone or upon falling down on a "Khila", he denied that injury on the neck could have been similarly caused.

13. Prosecution examined Dr. Grishma Divyang Patel- PW8 at exh.49. She was the Medical Officer at Ahmedabad Civil Hospital. When Balvantji was brought there on 21.3.1995, according to Doctor patient could not urinate and passed blood in urine. He had pain on the right lower side of the stomach. Upon X-ray, it was found that there was gas in stomach. Patient had suffered infection in the lung. There was a hole in the intestine. He therefore, had to be operated by giving general anesthesia. Patient died during the treatment on 26.3.1995. The patient had hole

in the intestine on account of some injury which could be caused by hitting the patient in the stomach with a Stick. The injury was sufficient in ordinary course of nature to cause death. It was on account of this injury that he suffered infection in the lung.

13.1 In his cross examination, she stated that when he was brought to the hospital. patient was conscious. In her examination, she did not find any external injury on the stomach. She stated that though X-ray would not reveal hole in the intestine. Since gas was spotted around the intestine, it could be diagnosed that there must be a hole in the intestine. She stated that if the hole was repaired immediately with the help of an operation, perhaps the patient could have been saved.

14.Dr. Vinayakrao Vasudevrao Patil-PW11 was examined at exh.57. He was the Doctor who had carried out the postmortem on the body of the deceased. He was also of the opinion that injury on the stomach was sufficient in ordinary course of nature to cause death. He also opined that such injury could have been caused with the help of a Stick.

15.On the basis of above evidence, learned advocates appearing for the parties made submissions before me.

16. Learned advocate Shri Saiyed for the appellants submitted that though patient Balvantji was carried from one hospital to another and was conscious all through out, his dying declaration was not taken in presence of Executive Magistrate. The patient had not given any history about the assault. In the statement before the police also, the deceased did not involve all the accused. It was contended that there was material contradiction in the prosecution story. It was further submitted that there was animosity between the complainant side and the accused. There was past history of complaints being filed and that therefore, possibility of false involvement cannot be ruled out.

16.1 It was further contended that from the evidence it can be seen that large crowd had gathered at the scene of incident and heavy stone throwing had taken place and it was entirely possible that deceased was hit by one such stone. The possibility of the deceased falling down on ground and being hit in the stomach by "Khila" also cannot be ruled out.

16.2 Reliance was placed on the decision in the case of **Raj Singh v. State of Haryana** reported in (2000) 10 Supreme Court Cases 151 to contend that in any case considering the facts

and circumstances of the case as also passage of time, the accused need to be granted the benefit of probation or reduction in sentence.

16.3 It was contended that even if the allegations stand fully proved, no intention or knowledge can be attributed to the accused of having caused injuries which is likely under normal circumstances to cause death. He therefore, submitted that at best conviction under Section 323 of Indian Penal Code can be justified.

16.4 Reliance was placed on the decision in the case of **Hari Kishan and State of Haryana v. Sukhbir Singh and other** reported in AIR 1988 Supreme Court 2127, wherein the Apex Court while maintaining conviction under Section 325 and 323 of Indian Penal Code, taking into account that occurrence was outcome of sudden flare up and there was no previous enmity between the parties and also taking into account lack of intention to commit murder, granted benefit of probation.

16.5 Reliance was also placed on the decision in the case of **Kadapagunta Swaminatha Reddy v. State of Andhra Pradesh** reported in 1996 Cri. L.J. 1387.

17. On the other hand, learned APP Shri P.D. Bhatte opposed the appeal. He submitted that

prosecution had fully established the case against the accused. There was direct eye witness account which was consistent with the medical evidence. The accused had given "Dhariya" and Stick blows to the deceased. He therefore, submitted that appeal should be dismissed.

18.As noted earlier, the complainant had narrated the incident of accused No.2 giving a "Dhariya" blow to the deceased Balvantji and accused Nos.3 and 4 giving blows on the stomach of the deceased with the help of Stick. He also narrated that accused no.1 gave "Dhariya" blow to Dalsangji who tried to intervene. This version of the complainant was fully supported by the injured eye witness Dalsangji-PW4 who resides close to the house of the deceased. Both the witnesses had also given account of previous complaint being lodged by younger brother of deceased Balvantji and accused having come to the house of Balvantji to persuade him to ensure that the case is compromised.

19.PW5-Parbatji Kadvaji also narrated the incident in similar fashion. All the witnesses denied Balvantji being hit by stone or being hurt in the stomach on account of falling down on the ground.

20.Oral evidence of eye witnesses was fully

supported by the medical evidence. Dr. Tushar Mohanlal Shetlavad-PW2 had referred the patient Balvantji and Dalsangji to Civil Hospital at Mehsana where they were referred for further treatment to Civil Hospital at Ahmedabad. Dr. Grishma Patel-PW8 (exh. 49) was the Medical Officer at Ahmedabad Civil Hospital who had treated deceased Balvantji when he was brought there on 21.3.1995. She had also found that deceased had considerable discomfort on account of his stomach injury. An unusual deposit of gas in stomach convinced her that there must be some internal injury. Deceased was operated upon for a hole in intestine. However, during the treatment Balvantji died on 26.3.1995. This Doctor was of the opinion that injury in the stomach could have been caused by Stick blows. She stated that deceased had infection in lung on account of the stomach injury. She was of the opinion that injury was, under ordinary circumstances, sufficient to cause death. This was also the opinion of Dr. Vinayakrao who has carried out postmortem. It can thus be seen that oral evidence of eye witnesses was not only consistent but was also well corroborated by the medical evidence. Of-course, there are bound to be some minor contradictions here and there. In the present case, I find no material contradiction which would demolish the prosecution theory. In fact, the entire incident gets support from several angles. Admittedly,

there was a criminal case filed by brother of the deceased Balvantji. As per the eye witness account, accused persons with "Dhariya" and Sticks, came to the house of Balvantji and first asked him to compromise the case when he declined, he was attacked with "Dhariya" and Sticks. When Dalsangji-PW4 tried to intervene, he was also given a "Dhariya" blow. The weapons were also recovered by the police at the instance of the accused and recovery Panchnama was drawn and duly brought on record of the Court.

21.Considering all these aspects of the matter, I have no doubt that prosecution had succeeded in establishing before the Court that deceased Balvantji was attacked by the accused.

22.It may however, be seen that so far as accused No.1 is concerned, even as per the prosecution, he had not given any blow to the deceased Balvantji. His role was confined to giving "Dhariya" blow to Dalsangji due to which he received an injury on his right elbow. As per the medical evidence, injury was 1cm x 0.5cm long and same was only skin deep. It would thus appear that the only role played by accused No.1 was to give a "Dhariya" blow to the witness. Dalsangji was given blow on his elbow which did not cause any serious injury. In fact, the injury was superficial in nature. Though all the

accused persons had come to the house of Balvantji to persuade him to compromise the criminal case and when Balvantji denied, accused No.2 gave a "Dhariya" blow to him and accused Nos. 3 and 4 gave Stick blows to Balvantji, it is not even the case of prosecution that accused had come premeditated with intention of committing murder of Balvantji.

23.Considering all these aspects of the matter, though accused Nos. 2,3 and 4 could be stated to have committed offences punishable under Section 304 Part-II read with Section 114 of the Indian Penal Code, insofar as accused No.1 is concerned, his conviction and sentence under such provision would not be warranted.

24.In the result, though conviction and sentence recorded against accused Nos. 2,3 and 4 i.e. appellants Nos. 2 to 4 herein passed by the trial Judge is maintained, insofar as appellant No.1 original accused No.1 is concerned, his conviction and sentence under Section 304 Part-II read with Section 114 of the Indian Penal Code is set aside. His conviction and sentence under Section 323 of the Indian Penal Code is maintained.

25.So far as appellant No.1 is concerned, his conviction now remains under Section 323 of the Indian Penal Code and was sentenced to undergo

rigorous imprisonment for a term of three months. More than 10 years have been passed since this conviction was recorded. The appellant No.1 was not stated to be a hardcore criminal. It would therefore, not be appropriate to send him to jail to serve out the rest of the sentence. He would therefore, be granted benefit of probation. So far as rest of the accused are concerned, I am inclined to not only confirm the conviction but sentence as well. I do not find that the appellants Nos. 2 to 4 have made out any case for granting probation.

26.Appellant No.2 had given "Dhariya" blow to the deceased on his neck which is vital part of the body. Appellants Nos. 3 and 4 had given Stick blows with such ferocity that deceased had serious injury in his intestine. In fact, blows caused hole in the intestine leading to his death. As per the medical evidence, such injury in ordinary course was sufficient to cause death. Under the circumstances, I find that probation cannot be granted to said accused persons.

27.In case of **Raj Singh** (supra), the Apex Court did not find it appropriate to grant probation, but considering the age of the convict being 77 years on the date of incident and passage of time and other circumstances reduced the sentence to one already undergone. In the

present case, the appellants have undergone only three to four months of imprisonment during trial and pendency of this appeal. Reduction in sentence to one already undergone would therefore be unjust.

28. In case of **Hari Kishan** (supra), the Apex Court granted benefit of probation after holding that Charge under Section 307 of Indian Penal Code is not proved and only conviction under Section 325 and 323 is required to be maintained.

29. Considering all these aspects of the matter, following order is passed :

- 1) Appellant No.1 is acquitted of offences punishable under Section 304 of Indian Penal Code read with Section 114 of the Indian Penal Code.
- 2) His conviction and sentence for offence punishable under Section 323 of the Indian Penal Code as imposed by the trial Court is maintained. He will however, have benefit of probation and will not have to serve out rest of the sentence.
- 3) The appeal of rest of the appellants i.e. appellants Nos. 2, 3 and 4 is dismissed.
- 4) The bail bond of appellant No.1 stands

cancelled.

5) Bail of appellants Nos. 2,3 and 4 stands cancelled. However, they will have time upto 31.1.2008 to surrender.

(Akil Kureshi,J.)

(raghu)